Supreme Court, U.S.
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IN THE

Supreme Court of the United States

Frank J. Crosby,
Individually and on Behalf of All Others
Similarly Situated,

Petitioner

v.

Bowater Incorporated Retirement Plan for Salaried
Employees of Greater Northern Paper Inc. and
Bowater Incorporated,

Respondents

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

Petition for Writ of Certiorari

Bradley J. Schram
Robert P. Geller
Eva T. Cantarella *
Hertz, Schram & Saretsky, P.C.
1760 S. Telegraph Rd., Ste. 300
Bloomfield Hills, MI 48302
(248) 335-5000

Counsel for Petitioners

February 8, 2005 * Counsel of Record

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTION PRESENTED

In the early 1970s, Congress conducted a study on pension plans and found that "many employees with long years of employment [were] losing anticipated retirement benefits" due to the lack of minimum vesting and funding standards. 29 U.S.C. §1001 ("Congressional findings and declaration of policy") (A-71). To remedy this problem, Congress enacted the Employee Retirement Income Security Act ("ERISA"), which established minimum vesting and funding standards respecting employer-provided pension benefits. Id. Pursuant to ERISA §502(a), Congress also provided participants and beneficiaries with a private right of action for violations of ERISA or the terms of the plan. This Petition concerns the remedies available under subparagraph (3) of ERISA §502(a).

Petitioner Frank J. Crosby ("Crosby") was a participant in the respondent pension plan ("Plan"), which was sponsored and administered by respondent Bowater Incorporated ("Bowater"). Article VIII of the Plan states that if a participant dies before normal retirement age (defined as age 65), the lump sum present value of the participant's vested accrued benefit "shall" be paid to the participant's beneficiary or estate.

Crosby was 44 years old when Bowater determined that the lump sum present value of his accrued pension benefit (an annuity commencing at age 65) equaled $52,013.90 In deriving this amount, Bowater utilized a pre age-65 ("preretirement") mortality discount. As respondents acknowledged in the District Court, a mortality discount is a discount for the probability that the benefit will not be paid if the participant dies. In light of this admission and Article VIII of the Plan, Bowater should not have utilized a preretirement mortality discount when it computed Crosby's lump sum. Indeed, ERISA §203(a), commonly known as "the anti-forfeiture rule," expressly prohibits the forfeiture of a vested accrued benefit unless the plan *expressly provides* for such forfeiture upon the death of the participant. 29 U.S.C.

§203(a)(2)-(3) (A-73).[1] As discussed, the Plan provides just the opposite with respect to participants who die before normal retirement age.

The District Court held that Bowater's use of a preretirement mortality discount caused an impermissible partial forfeiture of Crosby's accrued benefit in violation of ERISA §203(a)(2).[2] Consistent with the relief requested by Crosby, the District Court ordered respondents to (1) re-compute lump sums paid, and compute lump sums payable in the future, without a preretirement mortality discount, and (2) as to lump sums already paid, pay the difference between the re-computed amount and the original lump sum, plus prejudgment interest.

The Sixth Circuit never reached the merits of the dispute because it concluded that the relief sought and awarded constituted "money damages" unavailable under ERISA §502(a)(3), the remedial statute under which Crosby brought his claim. The Sixth Circuit vacated the judgment of the District Court and ordered that the Complaint be dismissed for lack of subject matter jurisdiction.

Although respondents had argued that Crosby's claim fell under ERISA §502(a)(1)(B), which *does* provide legal relief, as Crosby explained in the courts below, he brought his claim under ERISA §502(a)(3) because (1) it authorizes injunctive and restitutionary relief of the type sought and awarded *and previously recognized by this Court as available under §502(a)(3);* and (2) he could not recover under ERISA §502(a)(1)(B), which authorizes suits to recover benefits due *under the express*

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[1] See also 26 C.F.R. §1.411(d)-4, Q&A2(a)(4) (A-81) (enforcing ERISA §203(a) ("[Code] Section 411(d)(6) protected benefits [includes accrued benefits] may not be eliminated merely because they are payable with respect to a spouse or other beneficiary.").

[2] This holding was supported by considerable authority. See merits excerpt from Crosby's Appeal Brief (A-156); and Berger v. Xerox Corp. Retirement Income Guaranty Plan, 338 F.3d 755, 764 (7th Cir. 2003) (per curiam) (Posner, J. writing for the Court) (finding respondents' arguments to the contrary to be "unfathomable").

provisions of an ERISA plan. 29 U.S.C. §1132(a)(1)(B) (A-76).

While Article VIII is dispositive of whether the Plan contemplates a forfeiture of the lump sum if the participant dies before normal retirement age (and, therefore, whether a preretirement mortality discount may be utilized), Crosby could not *recover* under Article VIII because the benefit thereunder is payable solely to the participant's *beneficiary* or *estate*. Except for subparagraph (3) of ERISA §502(a), ERISA's other remedial provisions are plainly inapplicable. Therefore, if Crosby and the other members of the Class are to recover their benefit shortfall, they must do so under §502(a)(3), which authorizes suits by participants and beneficiaries to "(A) enjoin any act or practice which violates any provision of this subchapter [i.e., subchapter I of ERISA, which includes ERISA §203(a)] or the terms of the plan or (B) to obtain other appropriate equitable relief to (I) redress such violations or (ii) enforce any provisions of this subchapter or the terms of the plan." 29 U.S.C. §1132(a)(1), (3) (A-76). **The question before the Court is--**

> Whether the payment of pension benefits owed under ERISA's anti-forfeiture rule (but not under an express plan provision), which benefits remain in the defendant plan, constitutes equitable restitution available under ERISA §502(a)(3).

The answer to this question is critically important for several reasons. First, it is an important question of federal law because, where a pension shortfall occurs solely as a result of a violation of one of ERISA's minimum benefit rules (as opposed to breach of an express plan provision), the only remedial provision under which the shortfall may be recovered is ERISA §502(a)(3). Thus, the answer to the question will affect not only Crosby and the approximately 350 Class members he represents, but millions of pensioners across the country who reasonably expect that their pensions will be determined in accordance with ERISA's standards.

Second, the Sixth Circuit clearly misapprehended this Court's explanation in Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204 (2002), of the distinction between "money damages" and "equitable restitution," thereby distorting the principles governing this analysis articulated by this Court in Bowen v. Massachusetts, 487 U.S. 879 (1988) (discussed in Great-West). Like the Sixth Circuit here, courts too often fail to sufficiently delve into the nature of the specific claim before them, and blindly analogize to Great-West's unique factual scenario.

Third, in her concurring opinion in Aetna Health Inc. v. Davila, 124 S.Ct. 2488, 2503-2504 (2004), Justice Ginsburg, joined by Justice Breyer, explained that the Court urgently needs to revisit ERISA §502(a)(3) because this Court's prior decisions had "yielded a host of situations in which persons adversely affected by ERISA-proscribed wrongdoing cannot gain make-whole relief."

Finally, in just the past year alone, five Circuits, including the Sixth Circuit here, have struggled with the implications of Great-West, with inconsistent results. Compare Callery v. United States Life Ins. Co. in City of New York, 2004 WL 2830875 *4 (10th Cir. Dec. 10, 2004) (monetary relief unavailable under §502(a)(3)); Griggs v. E.I. DuPont de Nemours & Co., 385 F.3d 440, 441-442, 451-452 (4th Cir. 2004) (§502(a)(3) allows rescision of lump sum pension payment in favor of annuity benefits); Skretvedt v. E.I. Du Pont de Nemours, 372 F.3d 193, 213-215 (3rd Cir. 2004) (prejudgment interest available as "appropriate equitable relief" under §502(a)(3)); Mathews v. Chevron Corp., 362 F.3d 1172, 1186-1187 (9th Cir. 2004) (affirming §502(a)(3) relief that restored pension benefits to plaintiffs); Millsap v. McDonnel Douglas, 368 F.3d 1246, 1247-1248 (10th Cir. 2004) (backpay and other damages incurred as a result of defendants' violation of ERISA §510 unavailable under §502(a)(3)).

For all or any of these reasons, Crosby urges this Court to grant his Petition.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings are identified in the caption of the case. Respondent Bowater Incorporated Retirement Plan for Salaried Employees of Great Northern Paper Inc. ("Plan") is a defined benefit pension plan governed by ERISA. The Plan is sponsored and administered by respondent Bowater.

Crosby was a participant in the Plan, and he represents the following Class which was certified in the United States District Court for the Western District of Michigan:

> All participants or beneficiaries of participants who received a lump sum distribution from the Plan (either directly or indirectly via transfer to an individual retirement account or other eligible retirement plan), or who are entitled to receive a lump sum distribution now or in the future (either directly or indirectly via transfer to an individual retirement account or other eligible retirement plan).

CORPORATE DISCLOSURE STATEMENT

The petition is filed on behalf of Crosby and all other similarly situated *individuals* (i.e., the Class). Therefore, a corporate disclosure statement is not applicable. Supreme Court Rule 29.6.

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District Court

Opinion, granting Plaintiff's Motion for Class Certification, granting Plaintiff's Cross-Motion for Summary Judgment, denying Defendants' Motion to Dismiss, and granting in part and denying in part Plaintiff's requested equitable remedies (filed 11/26/02) (A-1). See also Crosby v. Bowater Inc. Retirement Plan for Salaried Employees of Great Northern Paper, Inc., 212 F.R.D. 350 (W.D. Mich. 2002).

Final Judgment and Injunction respecting the Opinion (filed 11/26/02) (A-27).

Opinion, awarding attorney fees and costs in favor of Plaintiff and against Defendants (filed 5/20/03) (A-29). See also Crosby v. Bowater Inc. Retirement Plan for Salaried Employees of Great Northern Paper, Inc., 262 F.Supp.2d 804 (W.D. Mich. 2003).

Sixth Circuit

Opinion, vacating the District Court's Judgment and remanding with instructions that the Complaint be dismissed for lack of subject matter jurisdiction (filed 9/09/04) (A-50). See also Crosby v. Bowater Inc. Retirement Plan for Salaried Employees of Great Northern Paper, Inc., 382 F.3d 587 (6th Cir. 2004).

Judgment respecting the Opinion (filed 9/09/04) (A-69).

Order, denying Petition for Rehearing En Banc (filed 11/10/04) (A-70).

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. §1254(1). Crosby seeks review of a decision of the Sixth Circuit Court of Appeals, entered September 9, 2004 (A-50), which reversed the District Court's grant of summary judgment for him on his claim that respondents violated ERISA §203(a)(2), commonly known as "the anti-forfeiture rule." An order denying Crosby's Petition for Rehearing En Banc was entered November 10, 2004 (A-70). The basis for federal jurisdiction in the District Court was ERISA §502(e), 29 U.S.C. §1132(e).

PRINCIPAL STATUTES AND REGULATIONS

ERISA §502(a)(3), 29 U.S.C. §1132(a)(3) (A-76)

INTRODUCTION

The overarching issue in this Petition is whether ERISA § 502(a)(3) provides a remedy for participants like Crosby who (1) seek benefits wrongfully withheld as a result of a violation of one of ERISA's minimum benefit rules (as opposed to breach of an express plan provision); and (2) cannot recover their benefit shortfall under any of ERISA's other remedial provisions. As explained in the Argument, these benefits constitute equitable restitution which must be available if ERISA's statutory scheme is to operate consistent with its intent.

STATEMENT OF THE CASE

I. Facts

The Plan is a "cash balance" pension plan because it defines benefits by reference to hypothetical credits to a bookkeeping account established for each participant, which the Plan refers to as the Personal Account. Plan at Article VI

(A-120); and IRS Notice 96-8 (A-97) (describing cash balance plans). Under the Plan, a participant's accrued benefit is an annuity commencing at normal retirement age, which the Plan defines as age 65. Plan at §§1.1, 1.32, 1.33, 1.34 (A-119-120). In lieu of the age-65 annuity, a participant who separates from employment before normal retirement age may elect a lump sum, payable on the first day of the second year following the participant's separation from employment. Plan at §§12.1(b), 12.2(b) (A-122). Pursuant to Article VIII of the Plan (A-121), if the participant dies before normal retirement age (age 65), the lump sum present value of the participant's vested accrued benefit "shall" be paid to the participant's beneficiary or estate.

Crosby worked for Bowater in its Great Northern Paper ("GNP") division. On August 17, 1999, Crosby separated from Bowater as a result of Bowater's sale of GNP. Crosby subsequently elected to receive his accrued benefit in the form of a lump sum, payable on January 1, 2001, the earliest date permitted under the Plan. In connection with this election, Bowater advised Crosby that his lump sum would equal the amount credited to his Personal Account as of December 31, 2000, or $48,732.14. Id. Believing this amount to be less than the present value of his accrued annuity benefit, Crosby notified Bowater that distribution of the amount credited to his Personal Account was contrary to IRS Notice 96-8, Lyons v. Georgia-Pacific Corp. Salaried Employees Retirement Plan, 221 F.3d 1235 (11th Cir. 2000), *cert. den'd*, 532 U.S. 967 (2001), and Esden v. Bank of Boston, 229 F.3d 154 (2nd Cir. 2000), all of which address the computation of lump sums from a cash balance plan. Id. Crosby's attorneys litigated the present-value claim in Lyons on behalf of the affected participants.

On or about January 1, 2001, and prior to receiving any response from Bowater, Crosby received a lump sum from the Plan equal to the amount credited to his Personal Account as of January 1, 2001, or $48,732.14. On February 12, 2001, Bowater notified Crosby that it had erred and that he was entitled to $52,013.90, not $48,732.14 as originally calculated. Bowater attached calculations to its letter evidencing that it

had used a mortality discount for the period before normal retirement age in determining the new amount.

Because Article VIII of the Plan expressly precludes a forfeiture of the lump sum if the participant dies before normal retirement age, Bowater should not have utilized a mortality discount for the period before age 65 when it re-computed Crosby's lump sum. Without this discount, Crosby's re-computed lump sum equaled $57,262.98, not $52,013.90. Accordingly, Crosby appealed Bowater's use of a preretirement mortality discount, relying again on IRS Notice 96-8's "Example" that calculates a lump sum from a cash balance plan using interest only (with no mortality discount) for the period before normal retirement age (See A-99). Bowater nevertheless affirmed its earlier computation, reasoning that use of a preretirement mortality discount was "required" under Internal Revenue Code §417(e)(3), commonly known as "the present value rule." See Final Denial Letter (A-123).[3]

II. Proceedings Below

Crosby brought his claim that respondents violated ERISA §203(a)(2) under ERISA §502(a)(3), which authorizes civil actions to (1) enjoin any act or practice that violates subchapter I of ERISA [which includes ERISA §203], or (2) obtain other "appropriate equitable relief" to redress such violations or enforce any provisions of subchapter I or the terms of the plan. 29 U.S.C. §1132(a)(3). After respondents

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[3] This reasoning was flawed because Code §417(e)(3) merely "requires" that the present value of an accrued benefit be no less than the present value computed using the interest rate and mortality table specified in that statute. 26 U.S.C. §417(e)(3) (A-79). The statutory mortality table is simply a list of mortality decrements (probabilities of death) for each age from 5-110. See Rev. Rul. 95-6 (A-111). It does not specify if and when such mortality decrements should be used, as that naturally depends on whether the plan calls for a forfeiture of the benefit on account of the death of the participant.

moved to dismiss , Crosby filed a cross-motion for summary judgment. The parties also briefed the propriety of certifying the putative Class and awarding the relief sought by Crosby.

On November 26, 2002, the District Court issued an Opinion wherein it certified the putative Class and held that respondents violated ERISA §203(a)(2) by using a preretirement mortality discount to compute lump sums from the Plan. Opinion (A-16, 18-21). As requested in Crosby's prayer for relief, the District Court (1) ordered the re-computation of lump sums paid, and computation of lump sums payable in the future, without a preretirement mortality discount; (2) as to lump sums already paid, ordered payment of the difference between the recalculated amount and the original lump sum, plus prejudgment interest; and (3) granted summary judgment for Crosby (A-21-25); and Final Judgment and Injunction (A-27). Respondents appealed these rulings.

The Sixth Circuit reversed on the ground that the payments constituted legal relief (specifically, "money damages"), and that legal relief is unavailable under ERISA §502(a)(3). Opinion (A-62-63). The Sixth Circuit then ordered that the Complaint be dismissed for lack of subject matter jurisdiction (A-68). On September 23, 2004, Crosby filed a Petition for Rehearing En Banc, which was denied on November 10, 2004. Order (A-70).

REASONS FOR GRANTING THE PETITION

I. Review Is Warranted Because ERISA Provides the "Broadest" of Equitable Remedies, But the Sixth Circuit's Construction of ERISA §502(a)(3) Leaves Participants Like Crosby Who Have Lost Benefits Due to Violation of the Minimum Benefit Rules Under Subchapter I of ERISA With No Remedy.

In ERISA's statement of policy, Congress noted that there existed a "lack" of "adequate safeguards" concerning the operation and administration of pension plans, causing "employees with long years of employment" to lose

"anticipated retirement benefits." 29 U.S.C. §1001 (A-71). Congress explained that, in order to "assur[e] the equitable character of [pension] plans," ERISA mandates that certain "minimum standards" be satisfied, and provides "appropriate remedies, sanctions, and ready access to the Federal courts" for violation of ERISA's provisions. Id. (emphasis added).

ERISA's legislative history reveals that Congress intended to afford aggrieved participants and beneficiaries the broadest of remedies and to eliminate jurisdictional obstacles to the recovery of benefits:

> The enforcement provisions [of ERISA] have been designed specifically to provide both the Secretary and participants and beneficiaries with broad remedies for redressing or preventing violations of the Act. The intent of the Committee is to provide the full range of legal and equitable remedies available in state and federal courts and to remove jurisdictional and procedural obstacles which in the past appear to have hampered effective enforcement of fiduciary responsibilities under state law or recovery of benefits due to participants.

H.R. Rep. No. 93-533, 1974 U.S.C.C.A.N. 4639, 4655 (Oct. 2, 1973) (emphasis added) (A-83); S. Rep. No. 93-127, 1974 U.S.C.C.A.N. 4838, 4870 (Apr. 18, 1973) (same) (A-82). Accordingly, the Senate Report emphasizes that participants may bring a civil action for any appropriate legal or equitable relief:

> Under the bill, the Secretary of Labor and participants and beneficiaries of a plan may bring civil actions for any appropriate legal or equitable relief to redress or restrain a violation of fiduciary duties. . . . Appropriate equitable relief may be granted in a civil action. For

> example, injunctions may be granted to prevent a violation of fiduciary duty, and a constructive trust may be imposed on the plan assets, if needed to protect the participants and beneficiaries.

Id. at 4988-89 (emphasis added). The subsequent House Report explains that Congress sought to enlarge the equitable remedies that were "traditionally available" because they failed to adequately safeguard the interests of participants and beneficiaries:

> In the absence of adequate federal standards, the participant is left to rely on the traditional equitable remedies of the common law of trusts. . . . The fact that statutory rules exist says little as to their efficacy in adjusting inequities that are visited upon plan participants, as evidenced by the hearings before this Committee. . . . Courts strictly interpret the plan indenture and are reluctant to apply concepts of equitable relief or to disregard technical document wording.

H.R. Rep. No. 93-533, 1974 U.S.C.C.A.N. 4639, 4643 (Oct. 2, 1973) (A-83) (emphasis added).

Perhaps not surprisingly, when Congress finally enacted ERISA, the only condition it placed on the equitable remedies available under ERISA §502(a)(3) is that they be "appropriate":

> A civil action may be brought–
>
> (3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (I) to redress such violations or

> (ii) to enforce any provisions of this subchapter or the terms of the plan;

29 U.S.C. §1132(a)(3) (A-76) (emphasis added). By its very language, ERISA §502(a)(3) contemplates relief broader than mere injunctive orders and, by use of the disjunctive "or," permits an award of appropriate equitable relief to redress the violation even absent a grant of injunctive relief.

Although ERISA does not define the term "equitable relief," when interpreting ERISA, this Court "begin[s] with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." FMC Corp. v. Holliday, 498 U.S. 52, 57 (1990) (interpreting ERISA §514) (quoting " Park 'N Fly, Inc. v. Dollar Park and Fly, Inc., 469 U.S. 189, 194 (1985)). The term "equitable" ordinarily means "just," "fair," and "right." Black's Law Dictionary 537 (6th ed. 1990) (A-118); Webster's Collegiate Dictionary 383 (1979) (A-119). Given ERISA's remedial purpose of protecting participants' interests in their employer-provided pension benefits, and its intent to provide the broadest of equitable remedies to redress violations of ERISA, the term "equitable relief" in ERISA §502(a)(3) was facially intended to mean relief that is "just," "fair," and "right."

Crosby seeks equitable restitution of funds in the Plan that properly belong to him and the Class under ERISA's anti-forfeiture rule. Requiring respondents to pay those benefits is obviously an appropriate equitable remedy. This conclusion is further supported by this Court's decision in Varity Corp. v. Howe, 516 U.S. 489 (1996) (and cases discussed in Parts II-V).

In Varity, defendants, "through trickery" caused plaintiffs to transfer to a newly-created subsidiary that was designed to fail and ultimately did fail, resulting in the loss of benefits for plaintiffs. Plaintiffs sought benefits they would have received under the former parent company plan if they had not transferred to the subsidiary. However, they could not recover under ERISA §502(a)(1)(B) because they were no longer participants in the plan. Therefore, they brought their

claims under ERISA §502(a)(3). Finding that defendants violated their ERISA fiduciary duties, the district court ordered reinstatement in the parent company plan and payment of lost benefits, rulings upheld by the Eighth Circuit.

This Court affirmed, reasoning that plaintiffs could not recover under ERISA's other remedial provisions, and that §502(a)(3) is a "catchall" provision that "act[s] as a safety net, offering appropriate equitable relief for injuries caused by violations that §502 does not elsewhere adequately remedy." Varity, 516 U.S. at 514. The Court added that ERISA's enforcement provisions were intended to provide "broad remedies" for redressing violations of ERISA; it was "hard to imagine" that Congress would want to deny injured beneficiaries a remedy; and granting a remedy was "consistent with" the literal language of the statute, ERISA's purpose of protecting participants and beneficiaries, and pre-existing trust law. Id. at 512-515.

Although payment of the benefits in Varity was not before *this* Court, the Eighth Circuit explained that the payments constituted equitable relief because (1) they were analogous to restitutionary backpay; and (2) in Mertens v. Hewitt Assocs., 508 U.S. 248 (1987), this Court analogized the remedies available under ERISA §502(a)(3) to the remedies available under Title VII and in Title VII cases, backpay is considered an equitable remedy. Varity v. Howe, 36 F.3d 746, 757 (8th Cir. 1994). This Court has characterized backpay as equitable relief, provided it is restitutionary.[4] Obviously, if restitutionary backpay constitutes equitable relief, then the

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[4] See Chauffeurs, Teamsters & Helpers v. Terry, 494 U.S. 558 (1990) ("We have characterized damages as equitable where they are restitutionary . . . Congress specifically characterized backpay under Title VII as a form of 'equitable relief' . . . backpay under Title VII would generally be restitutionary in nature.") (citing, *inter alia*, 42 U.S.C. §2000e-5(g) (A-80) and Curtis v. Loether, 415 U.S. 189, 196-197 (1974) ("We need not, and do not, go so far as to say that any award of monetary relief must necessarily be "legal" relief. . . . In Title VII cases the courts of appeals have characterized back pay as an integral part of an equitable remedy, a form of restitution.")).

payment of pension benefits owed pursuant to a statutory obligation similarly represents an equitable remedy.

Here, as in Varity, Crosby and the other members of the Class lost benefits on account of respondents' failure to comply with ERISA. They cannot recover those benefits under ERISA §502(a)(1)(B) which authorizes the recovery of benefits due under the express plan provisions.[5] Although Article VIII is dispositive of whether the Plan requires a forfeiture of the lump sum if the participant dies before normal retirement age (and, therefore, whether a preretirement mortality discount may be utilized), Crosby could not *recover* under the first or third remedy under §502(a)(1)(B) because the benefit under Article VIII is payable solely to the participant's *beneficiary* or *estate*. He also could not recover under §502(a)(1)(B)'s second remedy because the only "right" Article VIII provides to *a participant* is the right to have the lump sum paid to the participant's beneficiary or estate if the participant dies before normal retirement age.

Except for subparagraph (3) of ERISA §502(a), ERISA's other remedial provisions are plainly inapplicable. See 29 U.S.C. §1132(a) (A-76-77). Therefore, if Crosby and the other Class members are to recover their benefit shortfall, they must do so under ERISA §502(a)(3). Under Varity, recovery of the benefits should be available under that subparagraph. The Sixth Circuit's conclusion to the contrary leaves participants like Crosby with no remedy, a result that undermines ERISA's goals and purposes and has ominous implications if followed by other Circuits.

Lastly, there is a "presumption that similar language in two labor law statutes ha[ve] a similar meaning." Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58, 61 (1987) (ERISA context). Indeed, with respect to ERISA's remedial

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[5] More specifically, ERISA §502(a)(1)(B) authorizes suits by participants and beneficiaries to (1) "recover benefits due him under the terms of the plan," (2) "enforce his rights under the terms of the plan," or (3) "clarify his right to future benefits under the terms of the plan." 29 U.S.C. §1132(a)(1)(B) (A-76).

provisions, this Court's prior decisions reveal that the presumption is especially strong.[6] Through its incorporation of ERISA §409, ERISA §502(a)(2) deems the payment of monies owed due to breach of subchapter I of ERISA to be "equitable relief." Pursuant to ERISA §409, a plan fiduciary who breaches his/her ERISA fiduciary duties, including the duty to administer the plan in accordance with subchapter I of ERISA [see 29 U.S.C. §1104(a)(1)(D) (A-75)], is "personally liable" for "any losses to the plan" resulting from the breach and, in addition, must "restore to such plan any profits" the fiduciary made through use of the plan's assets "and shall be subject to such other equitable or remedial relief as the court may deem appropriate . . .." 29 U.S.C. §1109 (A-76). Use of the word "other" establishes that the payment of monies owed for breach of a duty imposed under subchapter I of ERISA constitutes "appropriate equitable relief."[7] Therefore, it should be presumed that Congress intended the term "equitable relief" in ERISA §502(a)(3) to share the same meaning; *viz*, the payment of monies owed due to breach of a duty imposed under subchpater I of ERISA, and any other appropriate equitable relief.

Any doubt that Congress intended monetary relief to

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[6] See Harris Trust & Savings Bank v. Salomon Smith Barney Inc., 530 U.S. 238 (2000) (holding that nonfiduciaries may be sued under ERISA §502(a)(3) because ERISA §502(a)(5), which is similarly worded, allows suits against nonfiduciaries); Varity Corp. v. Howe, 516 U.S. 489, 510 (1996) (holding that individual relief is available under ERISA §502(a)(3) because it is identical to ERISA §502(a)(5) except that it authorizes suits by participants, beneficiaries and fiduciaries, while §502(a)(5) authorizes suits by the Secretary).

[7] Although ERISA §502(a)(2) permits recovery on behalf of the plan only, Massachusetts Mutual Life Ins. Co. v. Russell, 473 U.S. 134, 144 (1985), plan assets must inure to the benefit of participants and beneficiaries. 29 U.S.C. §1103(c) (A-74). There exists no fathomable reason why Congress would choose to allow, under §502(a)(2), the recovery of monies that will inure to the benefit of all plan participants, but then disallow, under §502(a)(3), the recovery of monies owed to only a subset of all plan participants.

be available under ERISA §502(a)(3) should be resolved by this Court's long-standing recognition that violations of federal rights are entitled to appropriate remedies.[8] Where monetary relief is the only means of adequately redressing a violation of ERISA's minimum benefit rules, the statutory scheme must be construed to authorize redress.

II. Review Is Warranted Because the Sixth Circuit Misapprehended this Court's Explanation of "Money Damages" in Great-West.

The Sixth Circuit held that payment of the benefits owed constituted legal relief (specifically, "money damages") unavailable under ERISA §502(a)(3). Opinion (A-62-65). In reaching this conclusion, the Sixth Circuit largely relied on the following passage from this Court's decision in Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204 (2002), a case that addressed the remedies available under ERISA §502(a)(3):

> Almost invariably . . . suits seeking (whether by judgment, injunction, or declaration) to compel the defendant to pay a sum of money to the plaintiff are suits for 'money damages' as that phrase has traditionally been applied since they seek no more than compensation for loss resulting from the defendant's breach of legal duty. Bowen v. Massachusetts, 487 U.S. 879, 918-19 (1988) (Scalia, J., dissenting). And "[m]oney damages are, of course, the classic

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[8] Franklin v. Gwinnett County Public Schools, 503 U.S. 60, 65-69 (1992) ("From the earliest years of the Republic, the Court has recognized the power of the Judiciary to award appropriate remedies to redress injuries actionable in federal court . . .."); Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 392 (1971) ("[W]here federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief") (quoting Bell v. Hood, 327 U.S. 678, 684 (1946)).

> form of *legal* relief." Mertens, supra, at 255, 113 S.Ct. 2063.

534 U.S. at 210. Significantly, this Court quoted Mertens v. Hewitt Assocs., 508 U.S. 248 (1993), and Justice Scalia's dissent in Bowen solely for the proposition that "money damages" constitute legal relief. Id. at 210. Great-West, Mertens, and Bowen never held that all monetary relief is necessarily "money damages." On the contrary, Great-West explained that cases like Bowen, which seek monies owed pursuant to a statutory obligation, are equitable actions for specific relief, not suits for "money damages":

> *Bowen v. Massachusetts, supra,* upon which petitioners rely, is not to the contrary. We held in *Bowen* that the provision of the Administrative Procedure Act that precludes actions seeking "money damages" against federal agencies, 5 U.S.C. §702, does not bar a State from seeking specific relief to obtain money to which it claims entitlement under the federal Medicaid statute. . . . *Bowen* "did not turn on distinctions between 'equitable' actions and other actions . . . but rather [on] what Congress meant by 'other than money damages'" in the Administrative Procedure Act. *Department of Army v. Blue Fox, Inc.*, 525 U.S. 255, 261, 119 S.Ct. 687, 142 L.Ed.2d 718 (1999). Furthermore, *Bowen*, unlike petitioners' claim, did not deal with specific performance of a *contractual* obligation to pay *past* due sums. Rather, Massachusetts claimed that the Federal Government not only failed to reimburse it for past expenses pursuant to a statutory obligation, but that the method the Federal Government used to calculate reimbursements would lead to underpayments in the future. Thus, the suit was not merely for past due

> sums, but for an injunction to correct the method of calculating payments going forward. *Bowen, supra,* at 889, 108 S.Ct. 2722. *Bowen* has no bearing on the unavailability of an injunction to enforce a contractual obligation to pay money past due.

Id. at 212 (emphasis added). The latter part of the quoted language establishes that the relief sought in Bowen (an injunction requiring recalculation of benefits and payment of benefits under a federal statute) is materially the same as the relief sought here. Yet, this Court expressly held that the plaintiff (the Commonwealth of Massachusetts) was not seeking "money damages." Id.

Moreover, Bowen emphasized that requiring a defendant to pay money is not a sufficient reason to characterize the relief as "money damages":

> Our cases have long recognized the distinction between an action at law for damages–which are intended to provide a victim with monetary compensation for an injury to his person, property, or reputation–and an equitable action for specific relief–which may include an order providing for the reinstatement of an employee with backpay, or for "the recovery of specific property *or monies,* ejectment from land, or injunction either directing or restraining the defendant officer's actions." *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 688, 69 S. Ct. 1457, 1460, 93 L.Ed. 1628 (1949) (emphasis added). The fact that a judicial remedy may require one party to pay money to another is not a sufficient reason to characterize the relief as "money damages." Thus, we have recognized that relief that orders a town to reimburse parents for educational costs that Congress intended the town to pay is not

"damages."

Bowen, 487 U.S. at 893-894.

Bowen also explicitly endorsed Judge Bork's explanation, in Maryland Dept. of Human Resources v. Department of Health & Human Services, 763 F.2d 1441 (D.C. Cir. 1985), of the difference between "money damages" and the equitable remedy of "specific relief" for monies owed pursuant to a statutory duty:

> Judge Bork's explanation of the plain meaning of the critical language in this statute merits quotation in full . . .
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> "We turn first to the question whether the relief Maryland seeks is equivalent to money damages. Maryland asked the district court for a declaratory judgment and for injunctive relief "enjoin[ing] defendants from reducing funds otherwise due to plaintiffs, or imposing any sanctions on such funds for alleged Title XX violations." . . . We are satisfied that the relief Maryland seeks here is not a claim for money damages, although it is a claim that would require the payment of money by the federal government.
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> We begin with the ordinary meaning of the words Congress employed. The term "money damages," 5 U.S.C. §702, we think, normally refers to a sum of money used as compensatory relief. Damages are given to the plaintiff to *substitute* for a suffered loss, whereas specific remedies "are not substitute remedies at all, but attempt to give the plaintiff the very thing to which he was entitled." D. Dobbs, *Handbook on the Law of Remedies* 135 (1973). Thus, while in many instances an award of money is an award of damages, "[o]ccasionally a money

> award is also a specie remedy." . . .
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> In the present case, Maryland is seeking funds to which a statute allegedly entitles it, rather than money in compensation for the losses, whatever they may be, that Maryland will suffer or has suffered by virtue of the withholding of those funds. If the program in this case involved in-kind benefits this would be altogether evident. The fact that in the present case it is money rather than in-kind benefits that pass from the federal government to the states (and then, in the form of services, to program beneficiaries) cannot transform the nature of the relief sought-specific relief, not relief in the form of damages.

Bowen, 487 U.S at 893-895 (quoting Maryland, 763 F.2d at 1446).

Here, as in Bowen and Maryland, Crosby sought and was awarded monies owed pursuant to a statutory obligation. In the language of Dobbs, Crosby sought "the very thing to which he was entitled." D. Dobbs, *Handbook on the Law of Remedies* 135 (1973) (from quote, supra). Because Great-West and Bowen teach that such claims are not claims for "money damages," but are, instead, equitable actions for specific relief, the Sixth Circuit clearly misapprehended this Court's explanation of "money damages" in Great-West. Because other courts might, too, this Court should clarify that aspect of the decision.

III. Review Is Warranted Because This Court Has Repeatedly Held that the "Starting Point" for Analyzing ERISA Is the Common Law of Trusts, But the Sixth Circuit Concluded that Trust Law Was Irrelevant.

ERISA's legislative history indicates that Congress intended that courts construe ERISA's remedial provisions

under the common law of trusts. For example, the House Conference Report notes that Title I of ERISA "applies rules and remedies similar to those under traditional trust law to govern the conduct of fiduciaries." H.R. Conf. Rep. No. 93-1280, U.S.C.C.A.N. 5038, 5076 (emphasis added) (A-83). Congressman Al Ullman, then ranking majority member of the House Ways and Means Committee, reiterated this sentiment when he introduced the Report. 120 Cong. Rec. 29,198, 29,200 (1974) (A-84). And when Senator Harrison A. Williams, Jr., Chair of the Senate Committee on Labor and Public Welfare, explained the proposed ERISA fiduciary statutes to the Senate, he stated that "[t]he objectives of these provisions are to make applicable the law of trusts . . . and to provide effective remedies for breaches of trust." 120 Cong. Rec. 29,928-929, 29,932 (1974) (A-84).

Specifically relying upon this legislative history, Justice Brennan, in Massachusetts Mutual Life Ins. Co. v. Russell, 473 U.S. 134 (1985), explained that (1) Congress intended to engraft trust-law remedies onto ERISA's enforcement scheme; (2) trust law remedies are equitable in nature; and (3) courts applying trust law will order the recovery of money where necessary to protect the beneficiary's interests:

> Trust-law remedies are equitable in nature, and include provision of monetary damages. See, *e.g.*, G. Bogert & G. Bogert, Law of Trusts and Trustees, §862 (2d ed. 1982) (hereinafter Bogert & Bogert, Trusts and Trustees) . . .; Restatement (Second) of Trusts §§199, 205 (1959). Thus, while a given form of monetary relief may be unavailable under ERISA for other reasons . . . it cannot be withheld simply because a beneficiary's remedies under ERISA are denominated "equitable."
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> * * *
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> ERISA's legislative history also demonstrates beyond question that Congress intended to engraft trust-law principles onto the

> enforcement scheme . . . and a fundamental concept of trust law is that courts "will give to the beneficiaries of a trust such remedies as are necessary for the protection of their interests." [FN 16] 3 A. Scott, Law of Trusts §199, p. 1638 (1967). See also Restatement (Second) of Trusts §205, and Comment *a* (1959) (beneficiary entitled to a remedy "which will put him in the position in which he would have been if the trustee had not committed the breach of trust"); Bogert & Bogert, Trusts & Trustees §862.

Id. at 154 n. 10, 156-157, and n. 16 (Brennan, J., concurring).[9] Restatement §205, cited by Justice Brennan, states that trust remedies are "exclusively equitable" and that a breaching trustee is "chargeable with" loss caused, profit made, or foregone profit–remedies that obviously require the payment of money. Restatement (Second) of Trusts §205 (1959) (A-96).

Four years after Russell, in Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 111 (1989), this Court again observed the relevance of trust law to ERISA, opinion that "ERISA abounds with the language and terminology of trust law" and holding that "principles of trust law" guide the standard of judicial review to apply to actions under ERISA §502(a)(1)(B). Id. (citing Central States, Southeast and Southwest Areas Pen. Fund v. Central Transport, Inc., 472 U.S. 559, 570 (1985)).

Since Firestone, this Court has repeatedly held that the common law of trusts is the "starting point" for analyzing ERISA unless it is inconsistent with ERISA's language, structure, or purposes. Harris Trust & Savings Bank v. Salomon Smith Barney Inc., 530 U.S. 238, 250 (2000); Hughes

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[9] Although Russell concerned ERISA §502(a)(2), Justice Brennan wrote separately because he believed dicta in the opinion might be construed as also applying to ERISA §502(a)(3), and that some of that dicta was "incompatible with the structure, legislative history, and purposes of ERISA." 573 U.S. at 150-151.

Aircraft Co. v. Jacobson, 525 U.S. 432, 447 (1999); Varity, 516 U.S. at 496. Under traditional trust law, if the trustee committed a breach of trust, a court of equity would compel the trustee to do whatever was necessary to protect the beneficiaries' interests, including paying money. J. Pomeroy, Equity Jurisprudence §158 (4th ed. 1918) (A-92).[10] A. Scott, Law of Trusts §§199 and 205 (3d ed. 1967) (A-92).

Notwithstanding these trust-law principles and this Court's many statements that trust law is the "starting point" for analyzing ERISA, the Sixth Circuit concluded that trust law was irrelevant given the following statement in Great-West:

> These trust remedies are simply inapposite. In *Mertens*, we rejected the claim that the special equity-powers applicable to trusts define the reach of §502(a)(3).

Opinion (A-66) (citing Great-West, 534 U.S. at 219). The distinction, however, is between using these principles to "define the reach" and using them as the "starting point". Great-West and Mertens did not hold that trust-law remedies are irrelevant. With respect to ERISA §502(a)(3), they merely held that a court's equity powers are limited to awarding relief "typically" available in equity, such as "injunction, mandamus, and restitution, but not compensatory damages." Great-West, 534 U.S. at 214; Mertens, 508 U.S. at 256 (1993).[11]

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[10] This should not be confused with the doctrine (today referred to as the equitable clean-up doctrine) that a court exercising equity jurisdiction can resolve legal issues that arise in the case. Pomeroy, §181 (A-92).

[11] In Mertens, plaintiffs sought to have the defendant, an actuarial firm, compensate them for pension benefits they lost as a result of the firm's alleged knowing participation in breaches of ERISA fiduciary duties. 508 U.S. at 250-51, 255. The plaintiffs did not seek an injunction and could not allege that the actuarial firm was in possession of their lost benefits. Id. at 255. Finding that the actuarial firm had no control over the operation or

(continued...)

More importantly, the quoted statement appeared in the context of a claim, brought by the insurer of an ERISA health plan, to recover benefits paid to a beneficiary pursuant to an express plan reimbursement provision. In Great-West, this Court found that petitioners sought "to impose personal liability on respondents for a contractual obligation to pay money--relief that was not typically available in equity." 534 U.S. at 210, 221.

Crosby's claim does not sound in contract, as Crosby does not seek benefits owed under an express Plan provision;[12] he seeks benefits owed under ERISA's anti-forfeiture rule. If his claim was for benefits owed under the Plan, it would clearly be redressable under ERISA §502(a)(1)(B). The claim in Great-West was not redressable under that section because it was not "brought by a participant or beneficiary."

ERISA mandates that plan assets inure exclusively to the benefit of participants and beneficiaries and be used solely to pay benefits and plan administration expenses. 29 U.S.C. §1103 (A-74). Stated otherwise, participants retain, at all times, the exclusive right to their benefits. Further, the Plan holds participants' benefits in trust (A-120), and must pay such benefits in accordance with ERISA.[13] Crosby and the Class seek only property that rightfully belongs to them under ERISA's anti-forfeiture rule, and to prevent the Plan from being unjustly enriched from the wrongful retention of such property.

Although Crosby's claim is fundamentally different

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[11](...continued)
administration of the plan, this Court held that plaintiffs were seeking compensatory damages and denied relief. Id. at 255, 262.

[12] Palmer notes that, although the adequacy of a legal remedy does not impact the right to restitution in equity, the "inadequacy [of a legal remedy] strengthens the case for [equitable] restitution." G. Palmer, Law of Restitution §1.6 (1978) (A-90).

[13] 29 U.S.C. §1104(a)(1)(D) (A-75).

from the claim in Great-West, the Sixth Circuit nevertheless found the statutory basis of Crosby's claim to be a "distinction without a difference." Opinion (A-66). This finding directly contradicts Great-West and Bowen which explain that the payment of monies owed pursuant to a statutory obligation constitutes equitable restitution, not "money damages." Great-West, 534 U.S. at 212; Bowen, 482 U.S. at 893-895. The distinction clearly *does* make a difference.

Lastly, in the days of the divided bench, this Court repeatedly recognized that equity courts (1) had jurisdiction where there was no "plain, adequate, and complete remedy" available at law;[14] and (2) routinely ordered the payment of money that rightfully belonged to the plaintiff. For example, in Riddle & Co. v. Mandeville and Jamieson, 9 U.S. 322, 332-333 (1809), this Court held that "a right exists in the holder of a promissory note, at least where he cannot obtain payment at law, to sue a remote endorser in equity." Finding that the original endorser was insolvent, this Court reversed the decree dismissing petitioner's suit in equity, and ordered that defendants be "directed to pay the amount of the note." Id.

In a subsequent decision, this Court applied constructive trust principles in determining that petitioners' action for the payment of money was maintainable in equity. Clews v. Jamieson, 182 U.S. 461 (1901). In Clews, petitioners sued to recover money deposited with the governing committee of the Chicago Stock Exchange for the purpose of fulfilling a contract between petitioners and a brokerage firm. The bill was dismissed and the Seventh Circuit affirmed on the ground that the claim was at law, not equity. This Court reversed, reasoning that (1) when the funds were deposited, the committee effectively became a trustee thereof; (2) all trusts, whether express or implied, are within the chancellor's jurisdiction; and (3) equity courts may order the payment of money when necessary to protect the interests of the trust

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[14] See Buzard v. Houston, 119 U.S. 347, 351-352 (1886) (citing and quoting, in part, the Judiciary Act of 1789, c. 20 §16 (1 St. 82; Rev. St. §723)).

beneficiaries. Id. 182 U.S. at 479-481 (citing other cases).

Pennington v. Gibson, 57 U.S. 65 (1853), is also instructive because it cites numerous cases where the equity court ordered the payment of money, and this Court held that such decrees are enforceable. Equity courts could not, however, award punitive damages or enforce a penalty (unless a statute expressly authorized a penalty).[15]

The payment of benefits owed under ERISA's minimum benefit rules is based on statute, not contract. Moreover, the payments are not punitive in nature. Consequently, there can be no violence to this Court's holdings in Great-West or Mertens by allowing payment of the benefits under ERISA §502(a)(3).

IV. Review Is Warranted Because, in Great-West and Mertens, this Court Held that Equitable Restitution Is Available Under ERISA §502(a)(3), But the Sixth Circuit Misapprehended This Court's Explanation of Equitable Restitution.

Great-West and Mertens held that ERISA §502(a)(3) permits only such relief as was *typically* available in equity, "such as injunction, mandamus, and restitution, but not compensatory damages." Great-West, 534 U.S. at 214; Mertens, 508 U.S. at 256. Great-West explained that (1) in equity, restitution in the form of a constructive trust was available where money or property belonging to the plaintiff could be traced to funds or property in the defendant's possession; and (2) the plaintiff could also recover profits arising from the defendant's use of the property, even if a particular res containing the profits could not be identified. 534 U.S. at 213-215 and n. 2.

As discussed in the "standard current works" on

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[15] See Tull v. United States, 481 U.S. 412, 422 and n. 7 (1987); Stevens v. Gladding, 17 How. 447, 454-455 (1855); Livingston v. Woodworth, 15 How. 546, 559-560 (1854).

remedies,[16] the purpose of restitution is to prevent the defendant from being unjustly enriched at plaintiff's expense. D. Dobbs, Law of Remedies §4.1 (2d ed. 1983) (A-86); Restatement of Restitution §160 (1937) (A-93). To facilitate this goal, the equity courts devised the constructive trust, which is not actually a trust, but a remedy. Dobbs §4.3(2) (A-88); Restatement of Restitution §160, com. a. (A-93). Unlike damages, which measure the plaintiff's loss and seek to provide compensation for that loss, restitution measures the defendant's gain and seeks to force disgorgement of that gain. Dobbs §4.1 (A-86). If the plaintiff's loss is equal to the defendant's gain, the decree is still restitutionary.[17] Unfortunately, the Sixth Circuit failed to grasp this crucial point.

Here, the benefits sought and awarded are owed pursuant to a statutory obligation[18] and thus, rightfully belong to Crosby and the other Class members. Because the benefits remain in the Plan, the Plan is being unjustly enriched. Bowater is also being unjustly enriched because it is required under ERISA §302 (29 U.S.C. §1082) and the Plan (A-120) to fund the Plan sufficiently to pay all benefit obligations. By

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[16] Great-West suggested courts consult the Restatements and other "standard current works," such as Dobbs, Palmer and Corbin to determine the remedies that were available in equity. 534 U.S. at 217.

[17] Where tracing failed, the equity courts would not hesitate to enter a simple money judgment against the defendant. G. Palmer, Law of Restitution§1.3 (1978) (discussing Newton v. Porter, 69 N.Y. 133 (1877)) (A-90).

[18] For this reason, the Sixth Circuit cases cited by the Panel are inapposite, as each involved claims for reimbursement of benefits owed under an express plan reimbursement provision. That is, they concerned claims for breach of contractual obligations to pay money. See Quailchoice, Inc. v. Rowland, 367 F.3d 638 (6th Cir. 2004); Community Health Plan of Ohio v. Mosser, 347 F.3d 619 (6th Cir. 2003); Community Ins. Co. v. Morgan, 54 Fed.Appx. 828; 2002 WL 31870325 (6th Cir. Dec. 20, 2002); and Sheet Metal Local #24 Anderson Trustee v. Newman, 35 Fed.Appx. 204; 2002 WL 1033739 (6th Cir. May 21, 2002).

refusing to direct payment of the benefits owed, Bowater reduced its contribution requirements to the Plan--a clear gain for Bowater at Crosby's and the other Class members' expense. Because the Plan (actually) and Bowater (constructively) possess monies that statutorily belong to Crosby and the other Class members, payment of those monies constitutes equitable restitution, relief Great-West and Mertens held was available under ERISA §502(a)(3).

Nonetheless, the Sixth Circuit appears to believe that, because the benefits owed were not segregated in the Plan, Crosby's requested relief constitutes legal relief. See Transcript of Oral Argument in 6th Circuit (A-136). Great-West nowhere imposes a segregation requirement, but requires only that the monies be traceable to "particular funds" in the defendants' possession. 534 U.S. at 213. In the courts below, it was undisputed that the benefits owed were payable from the Plan *and that they remain in the Plan*. Surely that is sufficient to satisfy the possession requirement. If there is any doubt that it does not, one need only consider this Court's decision in Harris Trust & Savings Bank v. Salomon Smith Barney Inc., 530 U.S. 238 (2000).

In Harris Trust, Salomon owned interests in motel properties that it sold to the Ameritech Pension Trust ("APT"). The trustees for APT subsequently sued Salomon under ERISA §502(a)(3) for losses APT incurred in the motel properties, alleging that Salomon knew the properties were worthless.[19] There is no suggestion in Harris Trust that Salomon held the monies APT invested in the motel properties *in a separate account*. Yet, this Court found that the trustees could seek restitution from Salomon of the monies invested in the motels and any profits Salomon earned on those monies, reasoning that, at common law, equity would (1) impress a constructive trust on property obtained in a manner that rendered it "unconscientious" for the holder to retain it, and (2) order

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[19] See the Seventh Circuit's decision in Harris Trust for these and other background details. 184 F.3d 646, 647-648 (7th Cir. 1999).

restitution in favor of the one "truly and equitably" entitled to it. 530 U.S. at 250-251. Thus, this Court *assumed* that Salomon had possession and control of the money *somewhere*, and this was apparently sufficient to allow restitution of those monies under ERISA §502(a)(3).

Despite the compelling reasoning of the Court in Harris Trust, the Sixth Circuit deemed Harris Trust "inapposite" because Crosby was not seeking restitution to the Plan of assets conveyed to a third party. Opinion (A-65). This distinction finds no support in Harris Trust, as the Court explained that a constructive trust and restitution are available against both the original wrongdoer (here, the Plan and Bowater) and a third-party who subsequently acquires the property with knowledge of the wrongdoing. 530 U.S. at 250-251. As importantly, Harris Trust does not limit restitution to recovery of assets for *the plan*. Properly interpreted, Harris Trust fully supports the arguments advanced by Crosby.

V. Review Is Warranted Because Great-West Left Unanswered the Question of Whether Equitable Adjuncts to "Injunction, Mandamus, and Equitable Restitution" Are Available Under ERISA §502(a)(3).

Although Great-West made clear that legal relief is unavailable under ERISA §502(a)(3), it left unanswered whether the statute permits an equitable adjunct to relief that is undeniably equitable (e.g., injunction, mandamus, and equitable restitution). The question is of monumental importance because (1) in virtually every case where the court concludes that a benefit is calculated in violation of ERISA's minimum benefit rules, the court will enter an injunction requiring recalculation of the benefit, and (2) payment of the difference between the recalculated amount and original amount.[20]

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[20] See, e.g., Berger v. Xerox Retirement Income Guaranty Plan, 231

(continued...)

Because ERISA §502(a)(3) expressly denotes injunctions as appropriate equitable relief, an equitable adjunct to an *injunction* should likewise constitute appropriate equitable relief. After all, the value of an injunction that requires the recalculation of benefits becomes illusory if the district court cannot also order *payment* of the benefit shortfall. Congress intended that plaintiffs injured by violations of ERISA's minimum benefit rules obtain meaningful relief, not merely a document that formally acknowledges the violation. See 29 U.S.C. §1001 (declaring it to be the policy of ERISA to provide "appropriate remedies") (A-71).

Further, an equitable adjunct to an *injunction* is often functionally equivalent to relief this Court has deemed equitable, such as mandamus or equitable restitution. For example, in Miguel v. McCarl, 291 U.S. 442, 452, 455 (1934), this Court held that an injunction requiring the payment of pension benefits owed under a federal statute was "equivalent to" a writ of mandamus, and, therefore, the payment was available in equity. Although mandamus is typically directed to officers of a court or agency personnel, and applies solely to ministerial acts,[21] Miguel should apply by analogy because (1) the benefits sought and awarded are pension benefits owed under a federal statute (ERISA), and (2) once recalculated, payment becomes a purely ministerial act.

Porter v. Warner Holding Co., 328 U.S. 395, 398 (1946), is also instructive. Porter concerned whether §205(a) of the Emergency Price Control Act of 1942 permitted courts to order restitution of rents collected in excess of the maximums permitted under the Act. Section 205(a) authorized injunctive

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[20](...continued)
F.Supp.2d 804, 807, 808 (S.D. Ill. 2002), *aff'd and modified*, 338 F.3d 755 (7th Circ. 2003); Rybarczyk v. TRW, Inc., 1997 WL 129296 *11 (N.D. Ohio Mar. 4, 1997), *aff'd in pt., rev'd in pt., and remanded*, 235 F.3d 975 (6th Cir. 2001); Constantino v. TRW, Inc., 773 F.Supp. 34, 36, 46 (N.D. Ohio 1991), *aff'd in pt. and remanded in pt.*, 13 F.3d 969 (6th Cir. 1994).

[21] Black's Law Dictionary 961 (6th ed. 1990).

relief and "other orders" for violations of the Act. 50 U.S.C. App. §925(a) (A-81). Although the lower courts denied restitution of the excess rents, reasoning that there was no jurisdiction under §205, this Court reversed, reasoning that (1) restitution of the excess rents was an "equitable adjunct to an injunction decree"; (2) a court acting in equity has the power to award complete relief; (3) the payments were necessary to enforce compliance with the Act; and (4) §205(a) made no attempt to catalogue the types of orders available thereunder, leaving it to the courts to effectuate the policy of the Act. Porter, 328 U.S. at 399-400 (emphasis added).

Here, payment stems directly from the recalculation injunction; the payments are necessary to ensure compliance with ERISA's anti-forfeiture rule; and ERISA §502(a)(3) does not specify the types of orders a district court can issue. Under Porter, the payments sought and awarded are an equitable adjunct to the recalculation injunction. Therefore, the Order directing payment was a proper exercise of the District Court's equity jurisdiction.[22]

Finally, historically, the equity courts routinely ordered the payment of money in conjunction with other equitable

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[22] Although the Sixth Circuit acknowledged that the recalculation injunction was equitable, it concluded that (1) as to Crosby, the injunction was unnecessary because Crosby's advisors had already performed the recalculation; and (2) because Crosby had already received a lump sum from the Plan, albeit one that was less than his benefit entitlement under ERISA §203(a)(2), he was not a suitable Class representative for future lump sum payees. Opinion (A-67-68). Unfortunately, Crosby's advisors cannot compel respondents to alter the amount owed to Crosby; only a court can do so. Under the Sixth Circuit's own reasoning, the recalculation injunction constituted appropriate equitable relief under ERISA §502(a)(3). Crosby is a suitable Class representative for future lump sum payees because, as Crosby explained in his Affidavit (see A-132), after Bowater re-calculated his lump sum in the administrative proceedings, he left the additional amount determined under that calculation ($3,281.76) in the Plan. Therefore, Crosby *is* eligible for a lump sum from the Plan *in the future* and is a proper representative for future lump sum payees.

relief. J. Pomeroy §181 (A-92); Scott §§199, 199.3, 205 (A-92).[23] They reasoned that ordering the equitable adjunct promoted judicial economy by avoiding piecemeal litigation and was part of the equitable remedy.[24] Because equitable adjuncts were *typically* available in equity, under Great-West and Mertens, they should be available under ERISA §502(a)(3), at least where they are linked to other equitable relief. To conclude otherwise would leave participants and beneficiaries with less protection than they enjoyed *before* ERISA was enacted, an outcome antithetical to ERISA's goals and purposes.[25]

Lastly, in addition to the foregoing reasons for granting the Petition, this Petition offers the Court an opportunity to re-consider whether Congress actually intended to limit the remedies under ERISA §502(a)(3) to those that were typically available before the merger of law and equity. Several considerations strongly suggest that Congress did not.

First, Congress enacted ERISA in 1974–nearly four decades *after* the merger of law and equity. ERISA's legislative history reveals that Congress sought to enlarge the "traditional equitable remedies of the common law of trusts" because they

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[23] Southern R.R. Co. v. H.H. Tift, 206 U.S. 428 (1907) (injunction and restitution of unlawful freight rates collected); Hidalgo County Rd. Dist. No. 1 v. Morey, 74 F.2d 101, 103-105(5th Cir. 1934) (injunction restraining diversion of funds and payment of principal and interest on bonds); Pierce v. National Bank of Commerce in St. Louis, 268 F. 487, 491-492 (8th Cir. 1920) (redemption of pledged bonds and payment of interest on bonds); Chicago, M & St. P. Ry. Co. of Idaho v. United States, 218 F. 288, 301-302 (9th Cir. 1914) (specific performance of agreement and compensatory damages); United States v. Bernard, 202 F. 728 (9th Cir. 1913) (injunction and payment equal to reasonable value of public lands wrongfully enclosed); Atchison v. Sullivan, 173 F. 456, 70-471 (8th Cir. 1909) (injunction and restitution of illegal taxes collected).

[24] Id.

[25] See also Firestone, 489 U.S. at 114 (recognizing the anomaly of construing ERISA in a way that affords less protection to participants and beneficiaries than before ERISA was enacted).

were sometimes inadequate. H.R. Rep. No. 93-533, 1974 U.S.C.C.A.N. 4639, 4643 (Oct. 2, 1973) (A-83). Therefore, it is doubtful that Congress intended to entrench this modern statute in pre-1938 rules.[26]

Second, Congress is presumed to know the state of the law when it passes legislation.[27] When Congress enacted ERISA a federal court sitting in equity could order all relief necessary to make a party whole who had been injured by violation of a federal statute, including the payment of money.[28] Congress was presumably well aware of this when it enacted ERISA §502(a)(3).

Third, if Congress had intended to limit the remedies under ERISA §502(a)(3) to those typically available before the merger of law and equity, it could easily have said so. The fact that it did not confirms that ERISA §502(a)(3) provides remedies that are broader than those available in the days of the divided bench.

CONCLUSION

The Sixth Circuit's opinion portends a disturbing construction of ERISA's enforcement mechanism. It dangerously adopts a literal construction of buzz words in

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[26] See also Health Cost Controls of Ill. v. Washington, 187 F.3d 703, 711 (7th Cir. 1999) (Posner, J.) ("[T]here is nothing to suggest that ERISA's drafters wanted to embed their work in a time warp.").

[27] See South Dakota v. Yankton Sioux Tribe, 522 U.S. 329, 350 (1998); Miles v. Apex Marine Corp., 498 U.S. 19, 32 (1990); Cannon v. Univ. of Chicago, 441 U.S. 677, 697-698 (1979).

[28] See, e.g., Albermarle Paper Co. v. Moody, 422 U.S. 405 (1975) (injunction plus backpay for violation of Civil Rights Act); Chris-Craft Industs. v. Piper Aircraft Corp., 480 F.2d 341, 390-391 (2nd Cir. 1973) (injunction plus "ancillary" monetary relief for violation of securities laws); Jordan v. Weaver, 472 F.2d 986, 993, 994 and n. 14. (7th Cir. 1973) (injunction plus benefits owed under Aid to the Aged, Blind and Disabled program); Hodgson v. Wheaton Glass Co., 446 F.2d 527, 535-536 (3rd Cir. 1971) (injunction plus sums wrongfully withheld under Equal Pay Act).

Great-West and fails to recognize obvious factual distinctions that compel a different outcome here. In determining the equitable or legal nature of a remedy, courts must carefully scrutinize the facts underlying the substantive claim. Absent such scrutiny, courts will commit the same error that plagues the Sixth Circuit's decision. "Damages" and "monetary relief" are not synonymous, as equity under various circumstances authorizes relief that contemplates the payment of funds to a party who holds an equitable right to such funds. Circumstances surrounding Crosby's claim invite just that determination.

Respectfully submitted by,

Eva T. Cantarella*
Hertz, Schram & Saretsky, P.C.
1760 S. Telegraph Rd., Suite 300
Bloomfield Hills, MI 48302
(248) 335-5000
Counsel for Petitioners

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* Counsel of Record